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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC MICHAEL BRITTIAN,

Defendant and Appellant.

D058372

(Super. Ct. No. SWF013593)

APPEAL from a judgment of the Superior Court of Riverside County, Larrie R. Brainard, Judge. (Retired judge of the San Diego Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

A jury convicted Eric Michael Brittian of the first degree murder of Olivia Avalos and Lori Flores, attempting to murder Jack Ramirez and Joe Ramirez by personally discharging a firearm, and found true a multiple-murder special circumstance allegation. (For clarity and ease of reference, we refer to these individuals and other witnesses sharing the same last name by their first names.)

The trial court sentenced Eric to prison for life without possibility of parole, to be served consecutively to an aggregate indeterminate term of 180 years to life.

Eric appeals, contending (1) his convictions must be reversed because there was no solid, credible evidence that he was the assailant who committed the crimes, and (2) the trial court erred and deprived him of his federal constitutional rights when it instructed the jury with CALCRIM No. 315 regarding Olivia's purported eyewitness identification. He also asserts the trial court committed three sentencing errors, namely that the trial court erred when it (1) set the amount of the restitution fine, (2) imposed a parole revocation fine, and (3) imposed both an indeterminate life sentence and a sentence of life without the possibility of parole for the same conduct and offense.

The Attorney General conceded, and we agreed that the trial court erred in setting the amount of the restitution fine and in imposing a parole revocation fine. We otherwise rejected Eric's arguments and affirmed the judgment.

Our supreme court granted Eric's petition for review with directions to vacate the opinion and reconsider the claim of sentencing error regarding the life term in accordance with Penal Code section 190, subdivision (a). (Undesignated statutory references are to the Penal Code.) We requested and received supplemental briefs on this issue. We hereby vacate our previous decision and reissue our opinion with the exception of the life term sentencing error issue. We are not reconsidering the other issues given that the life term sentencing error issue does not affect them. We discuss them only because we are vacating our earlier opinion.

## FACTUAL AND PROCEDURAL BACKGROUND

The witnesses gave varying testimony and Jack recanted his earlier statements to police when he testified at trial; however, viewed in the light most favorable to the judgment, the evidence was as follows:

Eric lived with his parents on the Soboba Indian Reservation near the town of San Jacinto, California. Eric frequently drove a 2004 black Chevy Silverado truck.

Joe and his brother, Jack, lived with their girlfriends, Olivia and Lori, respectively, in San Jacinto. Olivia was about the same age as Eric. Olivia was the niece of the longtime girlfriend of Eric's godfather, Charles Eric Brittian (Charles Sr.), Kathy Martinez. Martinez and her family were "Mexicans" and not from Soboba. Charles Sr. knew problems between "Mexicans" and the people from Soboba had been going on for years. Joe also knew that Jack had a possible problem with "people up on the reservation."

Emily Brittian is Eric's second cousin. Emily knew Jack since 2000 or 2001 and had a romantic relationship with him in late 2005. However, Jack was also with Lori at the time. In August 2006, Emily had twins fathered by Jack. Emily used to hang out with Eric.

At about 10:00 p.m., on September 4, 2005, Joe, Lori and Olivia were sitting at a table in their home eating when someone fired gunshots outside. Jack, who was also inside the house, walked outside, followed by Lori, Olivia and Joe. Joe saw a truck parked in the street with a flash coming from it. More than ten shots were fired very quickly. Joe could not see the shooter because parts of the screen door shattered by

the shots had hit him in the face and eye. After the shots were fired, Joe went to Olivia who was lying just inside the door. Lori also ran inside and then collapsed in the living room. Olivia told Joe that Eric was the shooter.

Investigator James Campos with the Riverside County Sheriff's Department was the first to arrive at the shooting scene a few minutes after receiving the dispatch call. He contacted Olivia and Joe in the front doorway to the house and saw that Olivia had suffered multiple gunshot wounds. He also saw Jack and Lori and observed that Lori had also been shot. Campos testified that after he asked Olivia who shot her, she responded with the name, "Eric."

Joe told Campos that he believed Eric was the shooter because he saw Eric's truck; however, he admitted that he did not see Eric shoot. Joe told Campos that he had seen the driver of the truck before, that the driver was Eric and that Eric had been "mad dogging" Jack because the two men had problems.

A paramedic responded to the scene and treated Olivia. The paramedic sat with Olivia in the ambulance and stated that she was conscious, but very difficult to understand. He believed that he "possibly" could have asked Olivia regarding who shot her and that she responded by shaking her head "yes," and "no" and sometimes stating a few words.

Senior Investigator Robert Joseph of the Riverside County Sheriff's Department was in charge of investigating the shooting. Joseph interviewed Joe at the police station. The interview was audio and video recorded and a transcript of the interview

was created. When he asked Joe whether Olivia had said anything after the shooting, Joe claimed that Olivia had stated that Eric was responsible for the shooting.

Joseph also spoke to Jack the day after the shooting. Jack refused to go to the police station, so Joseph conducted a lengthy audio recorded interview at the scene. Jack relayed that he went outside after hearing shots, that he saw a newer black Chevy Silverado truck in the street that he had seen previously. A person got out of the truck and immediately started firing toward them.

Jack stated that he jumped off the porch and had a direct line of sight from where the person was shooting. Jack described seeing a high powered rifle and stated that "he let off a clip" or about 15 shots. Jack claimed that he had seen the truck many times before, knew that the shooter was "Indian," and that the shooter was not Charlie Boy, the son of Charles Sr. Jack told Joseph that the person who got out of the truck did the shooting and "I seen him with my own eyes." He then stated that he knew who Eric was, but that he had never met him. Jack saw the shooter aim in his direction and described the shooter as about six feet tall, with a normal-size build and wearing bulky clothes in a dark color.

A couple of days after the search of Eric's home, Joseph had another conversation with Jack. Joseph again asked Jack if he could identify the shooter. Jack responded that "[i]t was the person that drove the black truck that did it." When Joseph asked for that person's name, Jack responded, "That same dude." When Joseph asked Jack if he knew the name of the dude, Jack responded, "Yeah. You said his name just now." Joseph stated that he had previously mentioned Eric's name to Jack.

When Joseph asked Jack to say the person's name, Jack responded, "Why, man? Why do you want me to say it?"

After Joseph told Jack that he knew who the shooter was, Jack responded, "I was standing right there." When Joseph again asked Jack who did the shooting, Jack stated, "The same person that drives that black truck." Jack indicated that he had seen the shooter's face previously about once or twice. When Joseph again asked who did the shooting, Jack stated, "The person, the driver of that truck." Jack stated that he had seen the individual driving the truck "a bunch of times" and that "[he was] always around here." At one point during the interview, Jack indicated that the dome light inside the truck came on when the driver's side door opened; however, at that point in the interview, he claimed that he could not see a head. Jack also confirmed that the streetlight where the truck was positioned was on.

At trial, Joe testified that about a month before the shooting, he started to see a dark colored Chevy Silverado king cab truck in his neighborhood. After seeing the person driving the truck, he remembered having a conversation with Olivia as to who it might be. Joe was positive that on the night of the shooting, he saw the same truck that he had previously had a conversation with Olivia about. When asked whether the person inside the truck was in the courtroom, Joe replied, "I don't know if it's him." However, Joe described the person driving the truck as a young medium-sized man with long hair. When asked whether Olivia mentioned any names after the shooting, Joe testified that "[s]he seen the truck. She said it was Eric."

Jack testified that he spoke to detectives at the house after the shooting, but stated that he did not like speaking to them and did not like the police because he had suffered convictions for burglary and domestic violence. Jack did not remember telling police that he saw a truck pull up just before the shooting and that he had seen the truck before. Even after the prosecutor read from the transcripts of his two police interviews, Jack claimed that he could not remember anything he said during his interviews. Rather, Jack repeatedly claimed that he could not remember or did not know.

## DISCUSSION

### I. *Sufficiency of the Evidence*

#### A. General Legal Principles

When a defendant challenges the sufficiency of the evidence to support his conviction, we examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, 578.) We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.) The same standard of review applies even "when the conviction rests primarily on circumstantial evidence." (*Kraft*, at p. 1053.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

#### B. Analysis

For purposes of argument, Eric concedes that the truck used in the shooting was the same truck which he frequently drove. He asserts the entire judgment must be reversed because the prosecution failed to introduce any solid, credible evidence to support a finding by a reasonable jury that he was the shooter. We disagree.

Eric first asserts that Olivia's dying declaration to Campos identifying him as the shooter was incredible because (1) it was clearly Olivia's deduction based on seeing the truck and not an assertion of percipient knowledge as none of the other witnesses could see the shooter, (2) Campos's testimony was impeached, and (3) Olivia told the paramedic that she did not actually see or identify the shooter. We examine each contention in turn.

Immediately after the shooting, Joe spoke to Olivia. When asked at trial whether Olivia said any names, Joe responded, "Yep. [¶] She seen the truck. She said it was Eric." Eric contends that based on Joe's reference to the truck, the only reasonable conclusion the jurors could draw was that Olivia merely assumed Eric was



the shooter after she saw his truck. We disagree as the totality of the evidence does not suggest that it was impossible for her to see and recognize Eric.

The evidence presented at trial showed that Olivia personally knew Eric. Gloria, Olivia's aunt, testified that Olivia visited Kathy at her home with Charles Sr. Charles Sr. also reluctantly admitted that Eric and Olivia were at his house at the same time a couple of weeks before the shooting. On the night of the shooting, Lori and Olivia followed Jack out the front door. Although Eric argues it was pitch black outside, there was evidence presented from which the jury could reasonably infer that Olivia actually saw the driver. Namely, Joe remembered that the porch light was on when he went outside, and Jack told Joseph that the truck was parked under a streetlight and that the dome light inside the truck came on when the driver's side door opened.

We reject Eric's suggestion that Joe's inability to identify the shooter undermines Olivia's identification. The jurors could have reasonably rejected this possibility because Joe testified that he was the last person out the door, that more than ten shots were fired very quickly, and he could not see the shooter because parts of the screen door shattered by the shots hit him in the face and eye.

Campos's testimony also supported Olivia's identification. Campos testified that Olivia said the name "Eric" after he asked who had shot her. Eric asserts Campos's testimony was "patently incredible" because Campos admitted that he failed to record Olivia's statement to him in his police report, he had no explanation for his failure to do so, it should have been included, and he made a "mistake" when he failed

to do so. Campos claimed that although he forgot this information, his report was otherwise accurate. Campos also admitted that he never documented Olivia's statement, even though Senior Investigator Joseph asked him to do so in 2008, and the trial prosecutor had asked him to do so prior to trial, in late 2009. While these admissions could have impacted Campos's credibility, the believability of his testimony was a matter for the jury to decide. (CALCRIM No. 226.)

Additionally, the jury could have reasonably interpreted Jack's statements to Joseph immediately after the shooting as identifying Eric as the shooter. Despite Jack's claim that he had never met Eric, the evidence presented at trial suggested that the men knew each other. Jack dated Eric's second cousin, Emily, and fathered her twins. Joe knew that Jack and Eric had "problems" and had seen Eric "mad dogging" Jack from his truck.

The evidence also suggested that Jack had a clear view of the shooter, but that he was reluctant to name Eric. Jack was the first person out of the house after the first round of shots. He jumped off the porch, observed the shooter exit the truck, stated that the dome light inside the truck came on when the driver's side door opened, and claimed that he had a direct line of sight to the shooter. Jack told Joseph that the person who got out of the truck did the shooting and "I seen him with my own eyes." Although Jack refused to actually name Eric as the shooter, he told Joseph, "You said his name just now" after Joseph had mentioned Eric's name. The jury could have considered this evidence as corroborating Olivia's identification of Eric as the shooter.

Although Eric points out that neighbors Anthony Coaston and Hayden Jones looked outside during the shooting, but could not identify the shooter, it was up to the jurors to evaluate this testimony and decide how it possibly impacted Olivia's identification. Detective David Josker from the Riverside County Sheriff's Department interviewed these witnesses. Josker testified that he had conducted hundreds of interviews and found that some people are better witnesses than others and it often occurs that people standing next to each other see things differently. Moreover, the trial court instructed the jury with CALCRIM No. 226 concerning witness testimony in general. The instruction directed the jury to consider how well the witness could see, hear, or otherwise perceive the things about which the witness testified, how well the witness was able to remember and describe what happened, and that people witnessing the same event may see the event differently.

Finally, the jury could reasonably have concluded that the testimony of the paramedic who treated Olivia after the shooting did not add anything to the decision making process. A reading of the paramedic's entire testimony reveals that he recalled the topic of conversation, but could not remember the exact question he asked Olivia. While he might have asked Olivia who had shot her, she responded by shaking her head "yes," and "no" and sometimes stating a few words. The paramedic's statement to Investigator Josker after the shooting was somewhat more concrete; however, even at that time, he could not remember his exact question to Olivia. Rather, he stated it was along "the lines of do you know who did this to you?" and "did you get a good look at them?" with Olivia responding, "No." The paramedic admitted that he started

"bagging" Olivia immediately after questioning her because she was becoming hypoxic due to the loss of blood. He explained that individuals who are hypoxic can become restless, anxious and confused.

In summary, Eric's arguments ultimately turn on the credibility of the witnesses and we decline his invitation to reweigh the evidence.

## II. *CALCRIM No. 315*

### A. Facts

After the prosecution rested, the court asked counsel whether it needed to attend to any issue other than the jury instructions. Defense counsel proceeded to argue its motion for an acquittal, which the court denied. The court then noted that counsel would return to discuss the instructions and went off the record. Thereafter, the court discussed the jury instructions with counsel off the record.

The court then instructed the jury with a number of instructions, including CALCRIM No. 315 regarding eyewitness identification. CALCRIM No. 315 provided the following: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony." The instruction then listed numerous factors for the jury to consider in evaluating identification testimony. The instruction concluded by informing the jury that "[t]he People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

## B. Analysis

Eric contends the trial court abridged his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to proof of guilt beyond any reasonable doubt when it instructed the jury with CALCRIM No. 315, which effectively instructed the jury to consider Olivia's alleged dying declaration to be an eyewitness identification of him. He complains that the court did not instruct the jury that it was for them to determine whether or not a statement made by any particular witness constituted an eyewitness identification and that by giving CALCRIM No. 315, the trial court usurped the jurors' role of evaluating the evidence by telling them that they had heard such evidence.

As a threshold issue, the discussion between counsel and the court regarding jury instructions was not recorded. The record does not show that defense counsel objected to this procedure, nor does it indicate the instructions requested by defense counsel. Accordingly, it is impossible to determine whether defense counsel invited the alleged error or forfeited the alleged error by failing to object. (*People v. Coddington* (2000) 23 Cal.4th 529, 584 [defendant who believes that an instruction is erroneous or requires clarification must request correction or clarification of the instruction to avoid waiving the issue on appeal], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) No objection is necessary, however, to preserve a claim that an instruction violated a defendant's substantial rights. (§ 1259; *People v. Kelly* (2007) 42 Cal.4th 763, 791.) Assuming, without

deciding, that the challenged instruction affected Eric's substantial rights, we turn to the merits of his claims on appeal.

When reviewing a potentially misleading or confusing instruction for federal constitutional error, the relevant inquiry is "'whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) "A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]" (*People v. Cross* (2008) 45 Cal.4th 58, 67–68.) In deciding whether jury instructions correctly convey the law, we look to the instructions as a whole to see whether there is a reasonable likelihood the jury misunderstood the instructions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) An instruction can be found to be ambiguous or misleading only if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We presume that jurors are intelligent and capable of understanding and correlating all jury instructions given. (*People v. Carey* (2007) 41 Cal.4th 109, 130.) Applying these principles here, it is clear the challenged instruction is not objectionable.

Stripped to its essence, Eric contends that CALCRIM No. 315 is an incorrect statement of the law because it erroneously presents the identification as a fact by providing, "You have heard eyewitness testimony identifying the defendant."

However, this portion of CALCRIM No. 315 is essentially the same as CALJIC No. 2.92, which states, "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime[s] charged." The two instructions convey the same information to the jury in a different manner. Although our high court has not addressed the precise issue raised by Eric, it has concluded that CALJIC No. 2.92 is a correct statement of the law. (*People v. Wright* (1988) 45 Cal.3d 1126, 1144 ["CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence."].)

Moreover, we must evaluate Eric's claim that CALCRIM No. 315 erroneously usurped the jurors' role of evaluating the evidence by telling them that they had heard eyewitness testimony, by reviewing the instructions as a whole. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1248.) Notably, the trial court also instructed the jury "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. [Do not assume just because I give a particular instruction that I am suggesting anything about the facts.] After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.) This same instruction informed the jury that "[y]ou must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial." Thus, the trial court correctly instructed the jurors that it was for them to determine whether Olivia or any other person present during the shooting was or was not an eyewitness.

### III. Sentencing Issues

#### A. Restitution Fine

The trial court ordered Eric to pay a restitution fine of \$40,000. (§ 1202.4.) The Attorney General concedes, and we agree that the trial court erred in setting the amount of the restitution fine. Regardless of the number of counts involved, the maximum restitution fine that may be imposed in a criminal prosecution is \$10,000. (§ 1202.4, subd. (b)(1), *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.)

#### B. Parole Revocation Fine

The trial court sentenced Eric to life without the possibility of parole and imposed a \$40,000 parole revocation fine under section 1202.45. Eric contends, the Attorney General concedes, and we agree that the fine must be stricken because a parole revocation fine is only authorized in a case where the sentence of the person convicted of a crime includes a period of parole. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184.)

#### C. Life Sentence

The trial court sentenced Eric to consecutive terms of (1) 25 years to life on count one, plus 25 years for the firearm enhancement as to count one (murder of Olivia), (2) 25 years to life on count two, plus 25 years for the firearm enhancement as to count two (murder of Lori), and (3) life without the possibility of parole for the multiple-murder special circumstance finding under section 190.2, subdivision (a)(3).

In his opening brief, Eric contended the trial court erred when it imposed both an indeterminate life sentence and a sentence of life without the possibility of parole



for the same conduct and same offense. The People disagreed, asserting the sentence was correct. Relying on the language of the relevant statutes, Eric now contends the trial court erred by imposing all three sentences for the two murder convictions. He claims the correct sentence on both murder convictions is a single sentence of life without the possibility of parole. The Attorney General concedes that under subdivision (a) of section 190, it was improper to sentence Eric to both 25 years to life and life without the possibility of parole, but asserts the correct sentence is life without the possibility of parole for *each* murder conviction. Without citation to authority, the Attorney General also contends that an additional 25-year term should be added to each count for the firearm enhancements under section 12022.53. We agree with the Attorney General.

Subdivision (a)(3) of section 190.2, provides for a term of life without the possibility of parole in a case in which the defendant has been convicted of first degree murder and has also been convicted in the same proceeding of more than one offense of murder in the first or second degree. In *People v. Garnica* (1994) 29 Cal.App.4th 1558, the court explained that where a defendant has been convicted of two counts of first degree murder and one multiple-murder special circumstance allegation has been found true, that the multiple-murder special circumstance allegation may be used to impose multiple sentences of life without parole on multiple murder counts in a single proceeding based on the "remote but real possibility that one or another of the sentences might be commuted by the governor." (*Id.* at p. 1564.) In such a situation, the trial court can impose either concurrent or consecutive life without parole

sentences for each of the first degree murder convictions based on the single multiple-murder special circumstance. (*Ibid.*) In addition, a firearm enhancement under section 12022.53 is proper even when the defendant's sentence for the underlying crime is life without the possibility of parole. (*People v. Shabazz* (2006) 38 Cal.4th 55, 69 ["[T]he Legislature intended that the enhancements set forth in section 12022.53 be added to a defendant's sentence when the underlying offense is punishable by death or by life imprisonment without the possibility of parole."].)

Accordingly, we strike the sentence on count one, count two, and the sentence of life without the possibility of parole for the multiple-murder special circumstance finding. The judgment shall be modified to reflect that Eric's sentence on count one is life without the possibility of parole, plus 25 years and the sentence on count two is a consecutive term of life without the possibility of parole, plus 25 years.

#### DISPOSITION

The judgment is modified to (1) reduce the Penal Code section 1202.4, subdivision (b), restitution fine to \$10,000, (2) strike the parole revocation fine imposed under Penal Code section 1202.45, (3) strike the sentence on count one, count two, and the sentence of life without the possibility of parole for the multiple-murder special circumstance finding, and (4) reflect that Eric's sentence on (a) count one is life without the possibility of parole, plus 25 years and (b) count two is a consecutive term of life without the possibility of parole, plus 25 years.

As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a

certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.